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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ------

JAMES BROWN HARDY,
ACTING WARDEN OF THE MARYLAND STATE PENITENTIARY,
Petitioner,

v.

MILAN M. VUITCH, M.D.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James Brown Hardy, Acting Warden of the Maryland State Penitentiary, by Francis B. Burch, Attorney General of Maryland, and Francis X. Pugh, Assistant Attorney General of Maryland, his attorneys, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 9, 1972, which reversed the Order of the United States District Court for the District of Maryland of February 17, 1972, which had granted Petitioner's motion to deny the application of Dr. Milan M. Vuitch for bail.

CITATIONS TO OPINIONS AND ORDERS BELOW

The unreported Memorandum Opinion and Order of the United States District Court of February 17, 1972, appears at Appendix 11a.

The Order of the United States Court of Appeals of March 9, 1972, appears at Appendix 33a.

The Order of the United States Court of Appeals of March 30, 1972, denying the petition of Petitioner for a rehearing in banc, appears at Appendix 35a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 9, 1972. A timely petition for rehearing in banc was filed on March 21, 1972 (App. 1a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the United States Court of Appeals violate normal principles of comity governing the federal-state relationship by barring a state criminal court from implementing its judgment and sentence by admitting a convicted defendant to bail of indefinite duration where the United States Court of Appeals made no preliminary finding of invalidity or irregularity in the state proceedings or conviction?

STATEMENT OF THE CASE

Respondent Milan M. Vuitch was convicted in the Circuit Court for Montgomery County, Maryland, for performing an abortion in a place other than a licensed and accredited hospital. Article 43, Section 139, *et seq.*, Annotated Code

of Marlyand, 1971 Replacement Volume (App. 4a-7a). On November 18, 1969, Dr. Vuitch was sentenced to pay a fine of $5,000.00 and to serve a term of three years in prison, two years of which were to be suspended. The conviction was affirmed by the Maryland Court of Special Appeals on November 24, 1970. *Vuitch v. State*, 10 Md. App. 389, 271 A.2d 371. Dr. Vuitch's petition for writ of certiorari was denied by the Maryland Court of Appeals on February 9, 1971 and by the United States Supreme Court on October 12, 1971, 30 L. Ed. 2d 112.

On October 13, 1971, Dr. Vuitch filed a Petition For Writ Of Habeas Corpus in the United States District Court for the District of Maryland, together with an application for bail. The State of Maryland filed a motion to dismiss the Petition For Writ Of Habeas Corpus on grounds that Dr. Vuitch had not exhausted his State remedies in that he had not sought relief in the State courts under the Maryland Post Conviction Act. Article 27, Section 645A, *et seq.*, Annotated Code of Maryland, 1971 Replacement Vol. (App. 7a). A motion was also filed opposing the granting of bail.

On February 17, 1962, the District Court denied the motion to dismiss the petition, holding that State remedies had been exhausted, but granted the motion to deny the application for bail, holding that there were not present such exceptional circumstances as would justify granting bail (App. 11a). On February 23, 1972, United States Circuit Judge Harrison L. Winter issued a stay to the Order denying bail (App. 34a). Dr. Vuitch filed a memorandum in support of his application for bail (App. 16a). A reply memorandum and a motion to dismiss the appeal were filed by the State (App. 24a-32a).

The matter was considered by a panel of three Circuit Judges, without testimony or argument, and an Order was issued March 9, 1972, reversing the Order of the District

Court which had revoked bail (App. 33a). A Petition For Rehearing In Banc was filed. This Petition was denied on March 30, 1972 (App. 35a).

A hearing on the merits of the habeas corpus petition was held in the District Court on May 19, 1972, and the matter is presently sub curia.*

REASONS FOR GRANTING THE WRIT

This petition raises for resolution one aspect of the delicate federal court-state court relationship. In this case a defendant, Dr. Vuitch, had been convicted in a state court of performing an abortion in a place other than a licensed, accredited hospital, and was sentenced to a fine and imprisonment. His direct appeals, including an unsuccessful petition for certiorari to this Honorable Court, had been concluded. During his appeal Dr. Vuitch had sought to challenge the constitutionality of the statute under which he had been convicted, the Maryland therapeutic abortion statute (App. 4a). This issue was not ruled upon since it had not been raised properly at the trial level, either from a procedural or from an evidentiary standpoint. However, there was available to him, following his appeals, possible relief under the state post conviction procedure act (App. 7a).

Dr. Vuitch, ignoring this state post conviction procedure, filed a petition for writ of habeas corpus and application for bail in the federal district court. It is understood that he was motivated in part by a fear that he might be deemed by the state court to have waived his right to a constitutional attack on the statute by the following provision in the post conviction procedure statute, Article 27, Section 645A(c) of the Maryland Code:

---

* While this Petition was at printers, the Writ was granted by the District Court.

"(c) *When allegation of error deemed to have been waived.*—For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner."

In this connection, however, the state, in opposing any premature action in the federal courts on the grounds that Dr. Vuitch had not exhausted his state remedies, repeatedly asserted that it would not raise the question of waiver in a post conviction proceeding in a state court (App. 30a).

With respect to exhaustion of state remedies, the federal district court concluded simply:

"Unless principles of comity dictate a different conclusion the federal courts should simply be satisfied that the state courts have had a clear *opportunity* to pass upon the federal constitutional issue being raised by the petition for habeas corpus. *Fay v. Noia*, 372 U.S. 391 (1963). In this case the state courts have had ample opportunity to investigate and consider petitioner's contentions" (App. 13a).

With respect to the issue of bail, the federal district court stated:

"This Court is not persuaded that petitioner's allegations present such exceptional circumstances as to justify an exercise of its discretion admitting petitioner to bail in the instant case. *Mitchell v. Schoonfield*,

supra. However, a hearing in this Court will be scheduled at the earliest feasible time, so that if the Maryland statute is, in fact, found to be unconstitutional, petitioner may be released as soon as possible" (App. 15a).

The matter was then set for a hearing on the merits on March 17, 1972. It was at this stage that Dr. Vuitch's appeal to the United States Court of Appeals was entered following a stay of Judge Winter.

The action taken on the appeal by the Court of Appeals, without granting counsel the opportunity of argument, reflects an apparent determination by that court, for reasons left unexpressed, that Dr. Vuitch would not serve his state imposed sentence so long as that court could prevent it. In achieving this determination, the court violated established principles of comity and its own rules, and ignored completely questions and objections raised by Petitioner. And the Court of Appeals did not attempt to justify this far-reaching confrontation with the courts of the State of Maryland other than to make an undefined, conclusory statement that "there are present exceptional circumstances".

Petitioner questioned whether an immediate appeal would properly lie from a preliminary order denying bail in a habeas corpus proceeding. 28 U.S.C. 2253, provides in part:

> "In a habeas corpus proceeding before a circuit or district judge, the *final* order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." (Emphasis supplied.)

See also the reference to a "final order" in Rule 7(a) of the Fourth Circuit (App. 36a); *United States v. Uhl*, 137 F.2d 858 (2nd, 1943); *United States v. Yeager*, 449 F.2d

755 (3rd, 1971), footnote 3; *Parker v. Sigler*, 419 F.2d 827 (8th, 1969), footnote 1. The Court of Appeals ignored this question raised by Petitioner.

Petitioner raised in the Court of Appeals the question whether Dr. Vuitch had exhausted his state remedies, citing *Sockel v. Missouri State Board*, 297 F. Supp. 10 (W.D. Mo. 1968); *Brown v. Fogel*, 387 F.2d 692 (4th, 1967); *Mitchell v. Schoonfield*, 285 F. Supp. 728 (Md., 1968); *Hunt v. Warden*, 335 F.2d 936 (4th, 1964); *Midgett v. Warden*, 329 F.2d 185 (4th, 1964); *Ganger v. Peyton*, 379 F.2d 709 (4th, 1967); *Lewis v. State*, 423 F.2d 1048 (10th, 1970); and *Rudolph v. Warden*, 217 F. Supp. 579 (Md., 1963). The Court of Appeals ignored this question raised by Petitioner.

Petitioner raised in the Court of Appeals the argument that the setting of bail in a pending habeas corpus proceeding was a matter within the sound discretion of the district court and that the action of the district court should not be reversed without a finding that there was an abuse of that discretion. *Slough v. Yeager*, 449 F.2d 755 (3rd, 1971); *Brown v. Fogel, supra; Sims v. Wainwright*, 307 F. Supp. 116 (S.D. Fla., 1969); *Johnston v. Marsh*, 227 F.2d 528 (3rd, 1955); *Davidescu v. Rubinfeld*, 159 F.2d 147 (1st, 1947); *United States v. Watkins*, 175 F.2d 245 (2nd, 1945); *Mitchell v. Schoonfield, supra*. This argument too was ignored by the Court of Appeals.

The precedent set by the Court of Appeals in this case would permit a habeas corpus petitioner to be actively seeking the allowance of bail in the appellate court at the same time the district court is attempting to adjudicate his claims. It is respectfully submitted that this premature consideration of the case by the appellate court would of necessity prove disruptive to an orderly disposition of

the case by the district court. In the often cited case, *Principe v. Ault*, 62 F. Supp. 279 (N.D. Ohio, 1945), the court stated at page 282:

> "It has very generally been thought that the custody of the prisoner is entirely under the direction and control of the court to which the return is made."

The power over custody of the Petitioner vested in the Court of Appeals by Federal Appellate Rule 23(b) would appear to presuppose final disposition of the matter having been made in the district court. *Carlisle v. Landon*, 206 F.2d 191 (9th, 1953); *Vialpando v. Patterson*, 382 F.2d 588 (10th, 1967).

However, disruption in orderly procedure in the federal district court is not so directly a concern of Petitioner as is the affront to the courts and Legislature of the State of Maryland brought about by the action of the Court of Appeals.

The asserted power of the federal courts to admit state prisoners to bail prior to a hearing on the habeas corpus petition is a power most carefully exercised and limited to exceptional circumstances. *Johnston v. Marsh*, *supra*; *DeAngelis v. South Carolina*, 330 F. Supp. 889 (S. Car., 1971); *United States v. Nenna*, 281 F. Supp. 388 (S.D.N.Y., 1968), where the court stated at page 389:

> "It is, however, a power that ought to be most sparingly exercised. Where the State has carried a prosecution to conviction and the verdict has been sustained through the appellate process, including denial of certiorari and dismissal of appeal by the Supreme Court, there are compelling interests on the side of proceeding to execute the criminal judgment. It should require a substantial showing of countervailing circumstances to override or postpone that objective."

The Court of Appeals made no finding that the state conviction was improper or that the state statute was unconstitutional. In this connection it should be noted that under the terms of the March 9, 1972 Order of the Court of Appeals (App. 33a), bail must be continued *even if the federal district court finds the statute, under which Dr. Vuitch was convicted, to be constitutional!*

Since it made no preliminary finding, the action of the Court of Appeals can only be justified on the unacceptable premise that the statute in question, enacted by the Legislature of the State of Maryland, is *presumed* to be unconstitutional, or that proceedings in the courts of the State of Maryland in this case are *presumed* to be irregular. In assessing the full implication of this, due consideration must be given to the fact that certiorari was previously denied in this case by this Honorable Court. To the problem of never ending litigation in criminal prosecutions has now been added a new facet. Criminal defendants need not go to jail until not only all direct appeals, but all collateral appeals as well, have been concluded.

The action of the Court of Appeals presents other serious problems. It exists as precedent for the proposition that a federal court may interfere in a state's judicial procedure without setting forth any basis whatsoever. A harsher impact upon the delicate federal-state court relationship is difficult to imagine. It further leaves the district court, the State, and habeas corpus petitioners without any guidelines on the critical question of post appellate bail, with attendant problems of discrimination and equal protection with respect to other petitioners.

CONCLUSION

Petitioner recognizes that the United States Court of Appeals may have been reluctant to see a professional person, a medical doctor, become incarcerated, as long as there remained a possibility that a court could later find the statute under which he was convicted to be unconstitutional. However, some facts may not be ignored:

1) Dr. Vuitch was convicted of a deliberate violation of a state law.

2) Almost four years have already elapsed since the commission of the crime, during all of which time sentence has been deferred.

3) There is a well established presumption that the statutes of a state are valid and constitutional.

4) There was possible relief available to Dr. Vuitch in the state courts, which he chose not to avail himself of,

5) The one thing which distinguishes this habeas corpus petitioner from all other habeas corpus petitioners, i.e., he is a professional person, may not serve as a legitimate basis for according him special treatment, under our system of equal protection.

6) The action of the United States Court of Appeals, taken without any preliminary finding of impropriety in Dr. Vuitch's conviction, can only be classified as direct interference in the law enforcement process and judicial system of the State of Maryland. That this interference may have been motivated by humane considerations of the highest order does not change its character as interference, nor does it lessen its effect as precedent which will produce problems of the most serious nature in the future. The

Order of the United States Court of Appeals must be reversed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,

FRANCIS X. PUGH,
Assistant Attorney General
of Maryland,
For Petitioner.

APPENDIX

United States Court of Appeals
For The Fourth Circuit

Misc. No. 917

Milan M. Vuitch, M.D.,
Petitioner,

v.

James Brown Hardy, Acting Warden of the Maryland State Penitentiary,
Respondent.

PETITION FOR REHEARING IN BANC

James Brown Hardy, by Francis B. Burch, Attorney General of Maryland, and Francis X. Pugh, Assistant Attorney General of Maryland, his attorneys, pursuant to Title 28, Section 46(c), U.S.C.A., and Federal Appellate Rules 35 and 40, respectfully suggests a rehearing in banc, and in support thereof represent as follows:

1. Milan M. Vuitch was convicted in the Circuit Court for Montgomery County, Maryland for performing an abortion in a place other than a licensed and accredited hospital. (Annotated Code of Maryland, Article 43, Section 139, 1971, Replacement Volume, copy attached as Exhibit "A".)

2. On November 18, 1969 Dr. Vuitch was sentenced to pay a fine of $5,000.00 and to serve a term of three years in prison, two years of which were to be suspended.

3. The conviction was affirmed by the Maryland Court of Special Appeals on November 24, 1970. *Vuitch v. State,* 10 Md. App. 389; 271 A.2d 371.

4. Dr. Vuitch's petition for writ of certiorari was denied by the Maryland Court of Appeals on February 9, 1971 and by the U. S. Supreme Court on October 12, 1971.

5. On October 13, 1971 Dr. Vuitch filed a Petition for Writ of Habeas Corpus in the U. S. District Court for the District of Maryland and an application for bail. The State of Maryland filed a motion to dismiss the Petition for Writ of Habeas Corpus on grounds that Dr. Vuitch had not exhausted his State remedies in that he had not sought relief in the State courts under the Post Conviction Procedure Act. Article 27, Section 645A, *et seq.* of the Annotated Code of Maryland (1971 Replacement Volume, copy attached as Exhibit "B"). A motion was also filed opposing the granting of bail.

6. On February 17, 1972 the District Court denied the motion to dismiss the petition, holding that State remedies had been exhausted, but granted the motion to deny the application for bail, holding that there were not present such exceptional circumstances as would justify granting bail. A copy of the Order is attached as Exhibit "C".

7. On February 23, 1972 Judge Harrison L. Winter issued a stay to the Order denying bail.

8. Dr. Vuitch filed a memorandum in support of his application for bail, attached hereto as Exhibit "D". In response thereto, a motion to dismiss the appeal and Respondent's reply memorandum, attached hereto as Exhibits "E" and "F", respectively, were filed by the State.

9. The matter was considered without argument and an Order of this Honorable Court was issued on March 9, 1972, copy of which is attached hereto as Exhibit "G", reversing the Order of the District Court which had revoked bail.

It is respectfully submitted:

A. This Honorable Court did not rule on the following issues raised by the State of Maryland:

1) that no appeal lies from a preliminary order denying bail;

2) that the refusal to set bail, following conviction in a State court, prior to a hearing, should not be reversed

without a showing that the District Court abused its discretion;

3) that Dr. Vuitch had not exhausted his State remedies.

B. This Honorable Court made a conclusory finding "... that there are present exceptional circumstances ..." justifying the granting of bail. However, no delineation of these "exceptional circumstances" was set forth. Therefore, the effect of the ruling as precedent is uncertain; it is impossible to determine whether the finding of "exceptional circumstances" is supported by the record; and any possible review by the U. S. Supreme Court as to the legal sufficiency of the "exceptional circumstances" is made difficult.

C. There has been no ruling by any court, State or Federal, that the Maryland therapeutic abortion statute, under which Dr. Vuitch was convicted, is in any way unconstitutional. Therefore, the effect of the Order of this Honorable Court of March 9, 1972 is:

1) to remove the presumption of constitutionality of statutes ordinarily granted by the courts;

2) to, instead, cast a presumption of unconstitutionality upon a statute enacted into law by the General Assembly and Governor of the State of Maryland.

D. This Honorable Court stated no grounds as a basis for having jurisdiction over this matter at this stage of the proceedings other than a conclusory statement that "... it has jurisdiction ...".

E. Under the terms of the Order, bail is continued even if the district court denies the writ of habeas corpus, until an appeal has been decided. Dr. Vuitch asserts in his memorandum that the "Supreme Court has the identical issues under consideration". It is therefore possible that the District Court would deny the writ based on the said decisions of the U. S. Supreme Court and the State of Maryland would still be prevented from enforcing its laws by an Order of this Honorable Court.

F. The Order of this Honorable Court of March 9, 1972 fails to follow principles of comity, fosters a conflicting relationship between the federal courts on the one hand and the executive, legislative and judicial departments of the State of Maryland on the other hand, and establishes precedent which will prove burdensome both for the law enforcement function of the State and for the future operation of this Honorable Court. Under principles of equal protection, similar relief may well be demanded by all persons hereafter convicted of crimes in the State courts.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

FRANCIS X. PUGH,
Assistant Attorney General
of Maryland,

Attorneys for Respondent.

(Certificate of Mailing.)

EXHIBIT "A"

Annotated Code of Maryland
1970 Cumulative Supplement

Article 43

Abortion

§ 137. Conditions under which termination of pregnancy permitted; records and reports.

(a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place

in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exist:

(1) Continuation of the pregnancy is likely to result in the death of the mother;

(2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;

(3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;

(4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.

(b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth unless all of the following conditions exist:

(1) Not more than twenty-six weeks of gestation have passed (except in the case of a termination pursuant of subsection (a) (1) or where the fetus is dead); and

(2) Authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital.

(c) The hospital abortion review authority shall keep written records of all requests for authorization and its action thereof. An annual report of the therapeutic abortions performed in Maryland shall be made by the director of the hospital and its governing board. Such reports shall include the number of requests, authorizations and performances, the grounds upon which such authorizations were granted, and the procedures employed to cause the abortions and such reports shall be forwarded to the joint

commission on accreditation of hospitals and the State Board of Health and Mental Hygiene for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals. Such information, which is not subject to the physician-patient privilege, may be made available to the public. Said reports shall not include the names of the patients aborted. (1968, ch. 470, §2; 1970, ch. 736.)

§ 138. Refusal to perform or participate in or submit to abortion; refusal of hospital to permit.

(a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or any other recriminatory action against him.

(b) No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the State or any person.

(c) The refusal of any person to submit to an abortion or to give consent therefor shall not be grounds for loss of any privileges or immunities to which such person would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor be a condition precedent to the receipt of any public benefits. (1968, ch. 470, §2; 1970, ch. 736.)

§ 139. Unlawful acts.

(a) A person is guilty of a misdemeanor if he

(1) Sells or gives, or causes to be sold or given, any drug, medicine, preparation, instrument, or device for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by a licensed physician in a hospital accredited by the joint commission for accredita-

tion of hospitals and licensed by the State Board of Health and Mental Hygiene; or

(2) Gives advice, counsel, or information for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by such physician in such a hospital; or

(3) Knowingly assists or causes by any means whatsoever the obtaining or performing of a termination of human pregnancy other than by such physician in such a hospital.

(b) Any person who violates any provision of this section, upon conviction, is subject to a fine of not more than five thousand dollars for each offense, or to imprisonment for not more than three years, or both such fine and imprisonment. The penalties in this section are in addition to and not in substitution for any other penalty or penalties applicable to particular classes of persons under other laws of this State. (1968, ch. 470, § 2; 1970, ch. 736.)

EXHIBIT "B"

Annotated Code of Maryland, Art. 27
Post Conviction Procedure

§ 645A. Right of appeal of convicted persons.

(a) *Right to institute proceeding to set aside or correct sentence.* — Any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation, including any person confined or on parole or probation as a result of a proceeding before a trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) or a proceeding under Article 31B of the Code, title "Defective Delinquents," who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court or trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) was without jurisdiction to impose

the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, may institute a proceeding under this subtitle to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction.

(b) *When allegation of error deemed to be finally litigated.* — For the purposes of this subtitle, an allegation of error shall be deemed to be finally litigated when the Court of Appeals or Court of Special Appeals has rendered a decision on the merits thereof, either upon direct appeal or upon any consideration of an application for leave to appeal filed pursuant to § 645-I of this subtitle; or when a court of original jurisdiction, after a full and fair hearing, has rendered a decision on the merits thereof upon a petition for a writ of habeas corpus or a writ of error coram nobis, unless said decision upon the merits of such petition is clearly erroneous.

(c) *When allegation or error deemed to have been waived.* — For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner.

When an allegation of error could have been made by a petitioner before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any

habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, but was not in fact so made, there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

(d) *Decision that Constitution imposes standard not theretofore recognized.* — For the purposes of this subtitle and notwithstanding any other provision hereof, no allegation of error shall be deemed to have been finally litigated or waived where, subsequent to any decision upon the merits thereof or subsequent to any proceeding in which said allegation otherwise may have been waived, any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or of Maryland imposes upon State criminal proceedings a procedural or substantive standard not theretofore recognized, which such standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.

(e) *Not substitute for remedies incident to trial proceedings; time of filing petition for relief; other common-law and statutory remedies superseded.* — The remedy herein provided is not a substitute for, nor does it affect any remedies which are incident to the proceedings in the trial court or before the trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) or any remedy of direct review of the sentence or conviction. A petition for relief under this subtitle may be filed at any time, except that where an appeal has been taken from the judgment of conviction to the Court of Appeals or Court of Special Appeals, it shall not be necessary to appoint counsel or conduct a hearing or take any action whatsoever on the petition, until the judgment of conviction becomes final in the court to which the appeal was taken. No appeals to the Court of Appeals of Maryland or the Court of Special Appeals in habeas corpus or coram nobis cases, or from other common-law or statutory remedies which have heretofore been available

for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958, shall be processed in due course. Provided, however, that nothing in this subtitle shall operate to bar an appeal to the Court of Special Appeals (1) in a habeas corpus proceeding instituted under § 25 of Article 41 of this Code or (2) in any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of a crime or sentence of death or imprisonment therefor, including confinement as a result of a proceeding under Article 31B of this Code. (1958, ch. 44; 1959, ch. 429; 1965, ch. 442, § 1; 1966, ch. 12, § 4; 1970, ch. 99, § 4; ch. 595.)

* * * * * *

§ 645E. Same — Payment of costs by political subdivision.

If after judgment, a review is sought by the petitioner within thirty (30) days and the Court of Appeals or the Court of Special Appeals grants leave to appeal pursuant to § 645-I of this article and either of said courts finds that the petitioner is unable to pay the costs of the review, said courts shall order that all necessary costs and expenses incident thereto, including all court costs, stenographic services, and printing, be paid by the political subdivision in which the judgment is rendered. (1958, ch. 44; 1962, ch. 36, § 22; 1966, ch. 12, § 4.)

* * * * * *

§ 645-I. Application for appeal of final order; appeal procedure; affirmation, reversal, etc., of order.

Any person, including the Attorney General of Maryland or the State's attorney for Baltimore City or any county, as the case may be, aggrieved by the order of the court or judge passed in accordance with this subtitle, may within thirty (30) days after the passage of said order apply to the Court of Appeals of Maryland for leave to prosecute an appeal therefrom in cases where the applicant is incarcerated under sentence of death, and may within thirty (30) days after the passage of said order apply to the

Court of Special Appeals for leave to prosecute an appeal therefrom in all other cases. Said application for leave to prosecute an appeal shall be in such form as said appellate courts may, by their rules, prescribe, and in the event that the Attorney General or the State's attorney shall forthwith state his intention to file such application for an appeal, the order may be stayed, but the judge may, in his discretion, admit the petitioner to bail for his appearance when required. If the application to prosecute such appeal shall be granted, the procedure thereafter shall be in conformity with the rules of said appellate courts and the courts may affirm, reverse or modify the order appealed from, or they may remand the case for further proceedings, but if said application is denied, the order sought to be reviewed shall thereby become final. (1958, ch. 44; 1966, ch. 12, § 4.)

* * * * * *

EXHIBIT "C"

In The
United States District Court For The
District of Maryland

Civil No. 71-1129-Y

Milan M. Vuitch, M.D.,
Petitioner,

v.

James Brown Hardy, Acting Warden of the Maryland State Penitentiary.

Memorandum Opinion and Order

Petitioner, Milan M. Vuitch, M.D., was convicted in the Maryland state courts of having violated Article 43 of the Maryland Code, Section 139, a misdemeanor statute; he was sentenced on November 18, 1969, to serve a term of

3 years in prison, two of which were suspended, and to pay a fine of $5,000. The statute in question prohibits, in pertinent part, the performance of therapeutic abortions except in hospitals accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene.

At the trial, after the state had completed its case in chief, petitioner's counsel filed a motion for judgment of acquittal on two grounds: (a) the state's evidence was legally insufficient, and (b) the statute was unconstitutional because it was an unwarranted discrimination against this defendant in favor of physicians in accredited and licensed hospitals, because it was unnecessarily broad, and because it invaded "the area of protected freedoms of both the pregnant woman and the defendant, a licensed physician, in the private pursuit of their lives and duty, and is without compelling state interest sufficient to justify encroachment upon personal liberty." The trial judge denied the motion without commenting on the constitutional issue. The motion was renewed orally at the end of all the evidence, and again it was denied without comment.

Dr. Vuitch appealed to the Maryland Court of Special Appeals, which affirmed his conviction. That court held that the constitutional issues were not properly preserved for appellate review because petitioner's motion for judgment of acquittal was "not an appropriate vehicle to challenge the constitutionality, facial or otherwise, of the statute under which the criminal prosecution is initiated." *Vuitch v. State*, 10 Md. App. 389, 397, 271 A.2d 371, 376 (1970). The court said that the issue presented mixed questions of fact and constitutional law, and that such issues "are most appropriately determined upon pretrial motion and on a record there to be made which would provide the relevant evidentiary background so essential to place the constitutional questions in proper focus and perspective . . ." 10 Md. App. at 399-400, 271 A.2d at 377.

In a subsequent motion for reargument, petitioner sought a remand pursuant to Maryland Rule 1071 for full adjudication, following an evidentiary hearing, of the constitutional

issues; this motion was denied by the Court of Special Appeals.

Dr. Vuitch's petitions for certiorari were denied by the Court of Appeals of Maryland and by the United States Supreme Court. Following these denials, petitioner promptly filed a petition for habeas corpus and an application for bail with this court. He has never sought relief in the Maryland courts under the Post-Conviction Procedure Act (Article 27, §645A, *et seq.*, Annotated Code of Maryland).

The application for bail was granted by this court. Respondent, the acting warden of the Maryland State Penitentiary, has now moved for dismissal of the petition for habeas corpus on the ground that petitioner has failed to exhaust his state remedies, and for denial of bail to petitioner. For the reasons hereinafter given, respondent's motion to dismiss the petition will be denied, and its motion to have bail stricken will be granted.

I. *Exhaustion of State remedies*

Petitioner has exhausted his state remedies despite his failure to apply for relief under Maryland's Post-Conviction Procedure Act. It is well settled that when the highest court of a state has examined and passed on the same issue subsequently pressed on the federal court, then petitioner will not be required to present that issue to the state courts again by a different procedure. *Brown v. Allen*, 344 U.S. 443 (1953); *Grundler v. State of North Carolina*, 283 F.2d 798 (4th Cir. 1960); *Edmondson v. Warden, Maryland Penitentiary*, 335 F.2d 608 (4th Cir. 1964). Unless principles of comity dictate a different conclusion the federal courts should simply be satisfied that the state courts have had a clear *opportunity* to pass upon the federal constitutional issue being raised by the petition for habeas corpus. *Fay v. Noia*, 372 U.S. 391 (1963). In this case the state courts have had ample opportunity to investigate and consider petitioner's contentions.

II. *Application for Bail*

Respondent contends that petitioner's application for bail pending post-conviction adjudication should be denied because this Court's jurisdiction has not been properly invoked and because petitioner has failed to exhaust his state remedies.

The jurisdiction of this Court has been properly invoked in the present case pursuant to the inherent power of the judiciary to admit prisoners to bail and to the statutory authority of 28 U.S.C. §2243, which provides in pertinent part that "[t]he court [in a habeas corpus proceeding] shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Johnston v. Marsh*, 227 F.2d 528 (3rd Cir. 1955). See also *Brown v. Fogel*, 387 F.2d 692 (4th Cir. 1967).

This Court has already concluded that petitioner has properly exhausted his state remedies. However, the problem of exhaustion rises in a different context regarding the issue of bail. Rule 777(b) of the Maryland Rules of Procedure (Amended June 28, 1971, effective September 1, 1971: Annotated Code of Maryland, 1971 Cu. Supp.) provides in part that:

> *After Conviction — Pending Sentence or Appeal*
>
> After conviction, pending sentence or appeal, an accused may be admitted to bail in the discretion of the trial court. . . .

Since the language of Rule 777(b) does not contemplate bail in post-conviction proceedings, there is no state bail remedy for petitioner to exhaust at this stage, so that no rule of comity is disturbed. *Brown v. Fogel, supra.*

Ultimately, the decision as to whether bail should be granted in post-conviction proceedings is committed to the discretion of the trial court. *Mitchell v. Schoonfield*, 285 F. Supp. 728 (D., Md. 1968). Petitioner asks this Court to exercise its discretion and admit him to bail because several factors distinguish his case from the "ordinary" case. First, he has been convicted of violating Maryland's

therapeutic abortion law which has yet to be constitutionally tested. Second, petitioner doubts that his constitutional claims will be given serious consideration by the state courts. Third, he fears that his one year term of imprisonment will expire before the conclusion of PCPA proceedings. (This contention is mooted by the fact that this Court concludes that petitioner has exhausted his state remedies.) Finally, petitioner maintains that since the Attorney General has previously opposed petitioner's efforts to litigate his constitutional claims in state courts, the Attorney General should not now be permitted to argue that petitioner should remain in prison pending the exhaustion of his state remedies.

While this Court is of the opinion that it has jurisdiction to entertain an application for bail pending adjudication of petitioner's post-conviction claims and that petitioner has properly exhausted his administrative remedies, this Court will not exercise its discretion and admit to bail petitioner Vuitch during the pendency of any post-conviction proceedings. Power is one thing and the use of it another.

This Court is not persuaded that petitioner's allegations present such exceptional circumstances as to justify an exercise of its discretion admitting petitioner to bail in the instant case. *Mitchell v. Schoonfield, supra.* However, a hearing in this Court will be scheduled at the earliest feasible time, so that if the Maryland statute is, in fact, found to be unconstitutional, petitioner may be released as soon as possible.

For the reasons stated above, it is, therefore, this 17th day of February, 1972,

ORDERED:

1. That the respondent's motion to dismiss the petition for habeas corpus be and it is hereby denied.

2. That the respondent's motion to deny petitioner's application for bail be and it is hereby granted.

3. That petitioner present to this Court at a hearing on March 17, 1972 such evidence and arguments as he wishes the Court to consider in support of his contention that the statute under which he was indicted, tried and convicted is unconstitutional.

Joseph H. Young,
United States District Judge.

EXHIBIT "D"

In The
United States Court of Appeals
For The Fourth Circuit

Milan M. Vuitch, M.D.,
Petitioner,

v.

James Brown Hardy Acting Warden of the Maryland State Penitentiary,
Respondent.

Memorandum of Petitioner In Support of Application For Bail

Petitioner, Milan M. Vuitch, M.D., respectfully submits this memorandum to supplement the Appeal and/or Application for Bail herein, which was filed with the Court on February 23, 1972. On that date, the Court, by Judge Winter, stayed the Order of the District Court of February 17, 1972 denying bail to Petitioner. Judge Winter's Order reinstated, pending appeal herein, bail on $20,000 bond granted to Petitioner by the District Court on October 14, 1971. On February 24, 1972, the day *after* Judge Winter's stay order, the State's Attorney for Montgomery County,

Maryland, petitioned the Circuit Court for a bench warrant for the arrest of Petitioner.[1]

Summary Statement of the Case

Petitioner has been convicted in State court and sentenced to prison for violating Maryland's therapeutic abortion statute. Three times at trial, and at every stage of direct appeal, Petitioner contended that the convicting statute was unconstitutional. The Maryland courts refused to consider these constitutional claims since the statute, challenged three times at trial, had not been questioned by a pre-trial motion to dismiss the indictment. The result of this rule of procedural default, last enforced in 1858,[2] has been that Maryland's therapeutic abortion statute has not yet been subjected to constitutional scrutiny.

The underlying petition for habeas corpus herein asserts as its primary claim that the statute is unconstitutional. The District Court has set the matter for hearing on the merits on March 17, 1972. In the unique circumstances of this case, Petitioner should be admitted to bail pending the determination of the merits of his habeas corpus petition.

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[1] The bench warrant was issued on the same day. On February 25, 1972, before it was executed, the warrant was countermanded by the State's Attorney's office.

On February 23, 1972, Petitioner's counsel were advised that the Attorney General would advise the State's Attorney of Judge Winter's stay order, and that no action by Petitioner's counsel in this regard was necessary. Petitioner's counsel first learned of the Petition for a Bench Warrant on February 25, 1972, when they received a service copy in the mail. A copy of the Petition for a Bench Warrant is attached hereto as Exhibit A.

[2] Ironically, a breach of this rule (Rule 725 of the Maryland Rules of Procedure) was excused in 1883, the most recent time the issue arose. Petitioner has contended that this rule was arbitrarily and unreasonably applied to cut off his constitutional claims. The defects in the rule are outlined in Petitioner's pleadings before the United States Supreme Court, which are attached hereto as Exhibits B and C.

Reasons for Granting Bail

The compelling reasons for granting bail herein can be summarized briefly.

First, Petitioner's case presents substantial constitutional questions of public importance.[3] The Maryland statute limits therapeutic abortions to the expensive setting of general community hospitals. No such restriction is imposed on any other surgical procedure, despite the fact that properly performed therapeutic abortions are among the safest of operations and, indeed, are safer than ordinary childbirth.[4]

While it thus serves no rational medical purpose, the Maryland law's restriction of abortions to hospitals does deprive thousands of women of access to low-cost abortion procedures. This effect of the restriction, as well as its lack of rational purpose, is perhaps best illustrated by the fact that *the Maryland Department of Health regularly and systematically refers Maryland indigent patients to non-hospital abortion clinics (including Petitioner's facility) in the District of Columbia, and compensates those clinics for their services with medicaid funds.* It is Petitioner's contention that the hospital limitation — which has no rational justification, which unreasonably restricts physicians in their practice of medicine and which infringes on the rights of patients, particularly those who are poor, to seek medical care — violates rights secured by the First, Ninth and Fourteenth Amendments to the Constitution.[5]

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[3] The Maryland Court of Special Appeals, though it refused to consider Petitioner's claims, did acknowledge that they raised "important public issues." *Vuitch v. Maryland*, 10 Md. App. 389, 397, 271 A. 2d 371, 376 (Ct. Spec. App. 1970). (The Court's opinion is Exhibit B to the habeas corpus petition herein, attached to the Appeal and/or Application as Exhibit 1.)

[4] See *California v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970) for a helpful review of pertinent statistics and other materials.

[5] Petitioner's contentions are more fully detailed in his petition, which is Exhibit 1 to the Appeal and/or Application for Bail.

Second, the Supreme Court has the identical issues under consideration. These issues are currently before the United States Supreme Court in *Doe v. Bolton*, No. 70-40, 1971 Term. This case was argued on December 13, 1971 before the seven-member Court. A motion to postpone argument in a related case until the full Court could be constituted was denied.

The Supreme Court decision in *Doe v. Bolton* may well be controlling herein, and the decision could be handed down at any time. Clearly, Petitioner cannot justly be committed to prison when his constitutional contentions could be decided in his favor by the Supreme Court within a matter of weeks or even days. The potential injustice here is heightened by the fact that Petitioner has never yet been heard on the merits of his claims.

Third, the fact that Petitioner's constitutional claims have not yet been determined is due to the rigid enforcement of an unreasonable rule of procedural default. Maryland's rule of procedural default, outlined above and described in Exhibits B and C hereto, has postponed adjudication — despite Petitioner's attempts — of critical constitutional claims to the post-conviction stages. These claims go to the heart of the case, for they present the issue of whether or not what Petitioner did can constitutionally be punished as a crime. Maryland's procedural rule, which has already operated to defer litigation of this issue to post-conviction procedures, should not be permitted also to remand Petitioner to jail before the validity of his claims are determined.

Fourth, no undue delay would be caused by granting bail herein. As noted above, the District Court has set the matter for hearing on the merits on March 17, 1972. The Supreme Court could decide the issue at any time. Bail for Petitioner pending the resolution of these issues would thus not unduly delay incarceration. Denial of bail, however, would work substantial injustice, since Petitioner would be incarcerated under a constitutionally defective statute.

Fifth, as shown in the Appeal and/or Application for Bail, Petitioner is an excellent bail risk. Petitioner has complied with all terms of previous bail herein, and will continue to do so. Moreover, Petitioner here is a physician in good standing who seeks to assert substantial constitutional claims. The State has never asserted that Petitioner is anything but an excellent bail risk. Certainly there was no such contention before the District Court.

The Applicable Standards of Law

This Court clearly has power to grant bail to Petitioner herein. *E.g., Levy v. Parker*, 396 U.S. 1204 (1969); *Baker v. Sard*, 420 F.2d 1342 (D.C. Cir. 1969); *Mitchell v. Schoonfield*, 285 F. Supp. 728 (D. Md. 1968). Whether Petitioner's request for relief herein be considered as an application for bail, see *e.g., Levy v. Parker, supra*, and *Baker v. Sard, supra*, or an appeal from the District Court's denial of bail,[6] *e.g., Stack v. Boyle*, 342 U.S. 1 (1951), this Court should admit Petitioner to bail as requested because, as shown herein and in the Appeal and/or Application for Bail, this case presents exceptional circumstances which justify the grant of bail.

Federal Courts of Appeal have granted bail to state prisoners attacking convictions by federal habeas corpus. In *Boyer v. City of Orlando*, 402 F.2d 966 (5th Cir. 1968), and *Dawkins v. Crevasse*, 391 F.2d 921 (5th Cir. 1968), the Court granted bail even though petitioners had not exhausted state remedies. See also *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955).

A recent case in point is *Baird v. Eisenstadt*, 429 F.2d 1398 (1st Cir.), *prob. juris. noted*, 401 U.S. 934 (1971) (No. 70-17, 1971 Term). A state prisoner challenged an anti-contraceptive law. His constitutional claims were passed on and rejected on direct appeal, and a federal District Court had also rejected the merits of his federal claims on habeas corpus. Nonetheless, the First Circuit granted bail

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[6] The Petitioner has filed a notice of appeal from the District Court's Order.

on appeal from the District Court's habeas corpus decision. Here, of course, Petitioner's claims have, despite his efforts, *never* been adjudicated. Like the *Baird* petitioner, however, Petitioner here raises substantial questions concerning the constitutionality of the convicting statute.

The fact that the District Court denied bail does not mean that bail should be denied here. While the District Court tacitly rejected Petitioner's argument that bail should be granted since the constitutionality of the convicting statute had not been decided, the Court gave no other reason for denying bail. Moreover, since Respondent presented no evidence, and indeed has not contended, that Petitioner is anything but an excellent bail risk, Petitioner's worthiness for bail is undisputed and the District Court's fact-finding function was not exercised and need not be deferred to. See *Rhodes v. United States*, 275 F.2d 78 (4th Cir. 1960).

Conclusion

For the reasons stated herein and in Petitioner's Appeal and/or Application for Bail, Petitioner respectfully urges that this Court grant bail as described therein.

Respectfully submitted,

Roy Lucas,

E. Barrett Prettyman, Jr.,

Timothy J. Bloomfield,

Randall C. Coleman.

(Certificate of Service.)

Exhibit A

In The

Circuit Court for Montgomery County, Maryland

Criminal No. 9954

State of Maryland

v.

Milan M. Vuitch, M.D.,

Defendant

Petition for Bench Warrant

The State of Maryland, by Gerard E. Mitchell, Assistant State's Attorney for Montgomery County, Maryland, petitions this Honorable Court to issue a Bench Warrant for the defendant, Milan M. Vuitch, M.D., and in support of its Petition states as follows:

1. That on November 18, 1969, the defendant, Milan M. Vuitch, M.D., was sentenced in the above-entitled case to serve a term of three years in prison, with two of these years suspended, for a violation of Maryland's criminal abortion law, now codified as Article 43, Section 139, of the Maryland Code.

2. That the defendant appealed his conviction to the Maryland Court of Special Appeals, and that his conviction was affirmed. *Vuitch v. State*, 10 Md. App. 389 (1970).

3. That petitions for certiorari were denied by the Court of Appeals of Maryland and by the United States Supreme Court.

4. That the defendant filed a Petition for Habeas Corpus and an Application for Bail with the United States District Court for the District of Maryland.

5. That the Application for Bail was initially granted by the Federal District Court. Civil No. 71-1129-Y.

6. That the Warden of the Maryland Penitentiary subsequently moved the Federal District Court in Baltimore, Maryland, to deny the Application for Bail, and that this motion was granted on February 17, 1972, by Judge Young of the Federal District Court for the District of Maryland.

7. That because bail has been denied, the defendant is subject to incarceration pursuant to the lawful sentence imposed by the Honorable Ralph G. Shure, Judge of the Circuit Court for Montgomery County, Maryland.

Gerard E. Mitchell,

Assistant State's Attorney for
Montgomery County, Maryland.

(Certificate of Service.)

Exhibit I

In The
Circuit Court for Montgomery County, Maryland

Criminal No. 9954

State of Maryland

v.

Milan M. Vuitch, M.D.,

Defendant

Order of Court

Whereas the Petition for Bench Warrant filed by the State of Maryland in the above-entitled case has been read and considered, and

Whereas the State's Attorney for Montgomery County, Maryland, has provided this Court with a copy of the Memorandum Opinion and Order of Judge Young of the United States District Court for the District of Maryland, wherein the defendant's application for bail pending adjudication of post-conviction claims was denied on February 17, 1972, it is, therefore, this 24th day of February, 1972, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that a Bench Warrant issue for the defendant, Milan M. Vuitch, M.D., and that he be taken into custody and incarcerated pursuant to the sentence imposed in this case on November 18, 1969.

.....
Judge of the Circuit Court for
Montgomery County, Maryland.

EXHIBIT "E"

In The
United States Court of Appeals
For The Fourth Circuit

Milan M. Vuitch, M.D.,
Petitioner

v.

James Brown Hardy, Acting Warden of the Maryland State Penitentiary,
Respondent

Motion To Dismiss Appeal

Respondent James Brown Hardy, by Francis B. Burch, Attorney General of Maryland, Francis X. Pugh, Assistant Attorney General of Maryland, and Donald R. Stutman,

Assistant Attorney General of Maryland, moves to dismiss the Appeal filed herein by Petitioner and in support thereof states as follows:

1. No certificate of Probable Cause for Appeal, required by Rule 22(b) of the Federal Rules of Appellate Procedure, has been issued.

2. The Order of the United States District Court for the District of Maryland of February 12, 1972 is not a final order from which an immediate appeal may lie pursuant to 28 U.S.C.A. 2253.

3. Pending the issuance or denial of the writ of habeas corpus and the determination of the issues raised by Petitioner, custody of the person of Petitioner is within the discretion and control of the District Court and the application to the United States Court of Appeals is presently premature.

Francis B. Burch,
Attorney General of Maryland,

Francis X. Pugh,
Assistant Attorney General
of Maryland,

Donald R. Stutman,
Assistant Attorney General
of Maryland,
Attorneys for Respondent.

(Certificate of Service.)

EXHIBIT "F"

In The
United States Court of Appeals
For The Fourth Circuit

Milan M. Vuitch, M.D.,
Petitioner

v.

James Brown Hardy, Acting Warden of the Maryland State Penitentiary,
Respondent

Respondent's Memorandum In Support of Motion To Dismiss Appeal, and Reply Memorandum Concerning Granting of Bail

I. Motion To Dismiss

(a) Rule 22(b) of the Federal Rules of Appellate Procedure provides in part:

> "In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. . . . The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court."

Petitioner's Application for a Certificate of Probable Cause to Appeal was refused by the District Court (Judge Young) on February 22, 1972.

This Certificate requirement has been upheld by this Honorable Court. *Burgess v. Warden*, 284 F.2d 486 (4th, 1960), and has not been met in the instant case.

(b) 28 U.S.C.A. 2253 provides in part:

> "In a habeas corpus proceeding before a circuit or district judge, the *final* order shall be subject to review, on appeal, by the court of appeals for the Circuit where the proceeding is had." (Emphasis supplied.) See *United States v. Uhl*, 137 F.2d 858 (2nd, 1943).

The court raised serious doubt (but did not decide) whether an immediate appeal would lie from denial of bail pending disposition of a petition for writ of habeas corpus (filed coincidentally by a person convicted in a state court of committing an illegal abortion), in *United States v. Yeager*, 449 F.2d 755 (3rd, 1971), footnote 3. See also *Parker v. Sigler*, 419 F.2d 827 (8th, 1969), footnote 1.

(c) Present consideration of this matter by the Appellate Court is premature and disruptive of orderly disposition of the case by the Federal District Court. In the often cited case, *Principe v. Ault*, 62 F. Supp. 279 (N.D. Ohio, 1945), the court stated, at page 282:

> "It has very generally been thought that the custody of the prisoner is entirely under the direction and control of the court to which the return is made."

The power over custody of the Petitioner vested in the Court of Appeals by Federal Appellate Rule 23(b) would appear to presuppose final disposition of the matter having been made in the Federal Court. See *Carlisle v. Landon*, 206 F.2d 191 (9th, 1953); *Vialpando v. Patterson*, 382 F.2d 588 (10th, 1967). The cases cited by Petitioner, *Rhodes v. United States*, 275 F.2d 78 (4th, 1960); *Dawkins v. Crevasse*, 391 F.2d 921 (5th, 1968); *Boyer v. Orlando*, 402 F.2d 966 (5th, 1968); *Baker v. Sard*, 420 F.2d 1342 (D.C., 1969); and *Baird v. Eisenstadt*, 429 F.2d 1398 (1st, 1970), were all cases which had been finally resolved by the District Court and were actually on appeal to the Court of Appeals. The only exception could be considered to be the action of Mr. Justice Douglas in *Levy v. Parker*, 396 U.S. 1204 (1969) for which no precedent was cited. In this connection, *Cf. Valenti, et al. v. Spector*, 79 S. Ct. 7 (1958).

II. Assuming the Question to be properly before this Honorable Court, the judgment of the District Court should be affirmed:

(a) At least prior to *Johnston v. Marsh*, 227 F.2d 528 (3rd, 1955), there was considerable controversy over the authority of the Federal Courts, prior to a hearing on the habeas corpus petition, to remove a person from the custody of state officials to whom he had been sent by order of a state court, where his direct appeals, as in this case, had been completed. Id. at page 531. With the Federal Courts asserting a superior position to the state courts in the disposition of state laws, the Federal Courts commenced exercising, but to a very limited extent, the power of admitting state prisoners to bail. This asserted power, however, has been most carefully exercised and limited to exceptional circumstances. *Johnston v. Marsh*, *supra*; *DeAngelis v. South Carolina*, 330 F. Supp. 889 (S. Car. 1971); *United States v. Nenna*, 281 F. Supp. 388 (S.D.N.Y., 1968), where the court stated at page 389:

> "It is, however, a power that ought to be most sparingly exercised. Where the State has carried a prosecution to conviction and the verdict has been sustained through the appellate process, including denial of certiorari and dismissal of appeal by the Supreme Court, there are compelling interests on the side of proceeding to execute the criminal judgment. It should require a substantial showing of countervailing circumstances to override or postpone that objective."

It is one thing for a Federal court, having already determined in a given case that a conviction was arrived at in violation of a constitutional right, to order a release from confinement. Anything less would do violence to ordinary concepts of justice. However, it is quite another for a Federal court to contravene the judgment of a state court *absent* any finding of unconstitutionality in the proceedings. To do so, in the absence of compelling circumstances,

would come perilously close to placing an initial presumption of irregularity on state proceedings or a presumption of unconstitutionality of state statutes, a view which would cause unnecessary friction between the state and federal court systems.

There is another practical consideration which requires that the federal rule of restricting bail pending review of a habeas corpus petition to exceptional circumstance, be strictly followed. Any looser approach would unleash an unmanageable flood of bail petitions to the federal district and appellate courts.

Whatever the justifications, the federal rule does limit bail to exceptional situations. In this connection it must be noted that the district court, in its opinion in this case, stated:

> "This Court is not persuaded that petitioner's allegations present such exceptional circumstances as to justify an exercise of its discretion admitting petitioner to bail in the instant case."

In the absence of exceptional circumstances, petitioner's bail request must be denied.

(b) The setting of bail, in a pending habeas corpus attack on a state conviction, is a matter within the sound discretion of the district court, and on appeal the review is limited to a determination as to whether there was an abuse of that discretion. *Slough v. Yeager, supra; Brown v. Fogel*, 387 F.2d 692 (4th, 1967); *Sims v. Wainwright*, 307 F. Supp. 116 (S.D. Fla. 1969); *Johnston v. Marsh, supra; Davidescu v. Rubinfeld*, 159 F.2d 147 (1st, 1947); *United States v. Watkins*, 175 F.2d 245 (2nd, 1945); *Mitchell v. Schoonfield*, 285 F. Supp. 728 (Md., 1968).

It is respectfully submitted that the District Court gave full and careful consideration to Petitioner's claim and it cannot fairly be said that the court abused its discretion.

(c) The exhaustion of state remedies is not jurisdictional but is a rule of comity, which, in our federal system should

be faithfully applied in the absence of unusual circumstances. *Brown v. Fogel, supra,* at page 695; *Mitchell v. Schoonfield, supra.* It is evident that bail should not be set in a federal court where the federal jurisdiction has been prematurely invoked. *Sockel v. Missouri State Board,* 297 F. Supp. 10 (W.D. Mo., 1968). Many cases have held that state remedies cannot be considered to have been exhausted where relief under post conviction procedure has not even been sought. *Hunt v. Warden,* 335 F.2d 936 (4th, 1964); *Midgett v. Warden,* 329 F.2d 185 (4th, 1964); *Ganger v. Peyton,* 379 F.2d 709 (4th, 1967); *Lewis v. State,* 423 F.2d 1048 (10th, 1970); *Rudolph v. Warden,* 217 F. Supp. 579 (Md., 1963).

The Maryland Post Conviction Statute is attached hereto as Exhibit A. Petitioner's claimed reason for not seeking relief under that statute is a fear that he will be considered to have waived his right to test the constitutionality of the Maryland abortion statute in Post Conviction. The State of Maryland, however, has repeatedly taken the position, before Judge Young and Judge Winter, and repeats again for the record, that it earnestly believes that the constitutionality of the Maryland statute should be first tested in the Maryland courts, in a post conviction procedure, and that it will *not* raise the question of waiver in the state court.

There is one thing that has been consistently lost sight of but which is readily ascertainable both from the State's brief filed in the Maryland Court of Special Appeals and in the opinion of that court. The procedural mistake of Petitioner in the original trial was not the only problem the State perceived in any consideration on direct appeal of the constitutionality of the Maryland abortion statute. The State has consistently taken the position that the issue can only be considered in a proper evidentiary setting. The issue was attempted to be presented on direct appeal *with absolutely no evidence in the record.* The State did not believe this could be done and the Court of Special Appeals agreed. However, no effort has been made, or will be made,

by the State of Maryland, to block Petitioner's entry into the Maryland courts under post conviction.*

It is respectfully submitted, therefore, that the opinion of the District Court that Petition had exhausted his state remedies is erroneous, and should be reversed, and for that reason also, federal bail for Petitioner, at this time, is premature.

III. The State deems it necessary to briefly respond to some matters contained in Petitioner's Memorandum.

(a) The Attorney General and the Assistant Attorney Generals in this case take personal exception to the insinuation, in footnote 1 in Petitioner's Memorandum, of duplicity. Any promise made by the Attorney General was lived up to. Furthermore, the entire allegation is irrelevant to the point at issue and the purpose of its being included in the Memorandum is unclear.

(b) The Memorandum repeats the misstatement that the Maryland courts refused to considered Petitioner's constitutional claims solely because of a procedural rule. One need only look to the factual allegations set forth at the bottom of page 2 and page 3 of the Memorandum, many of which Respondent disputes, to see that there are indeed facts involved in this issue, and that proper appellate review on a completely barren record was impossible.

(c) With respect to the procedural rule in question, Petitioner makes a bald, unsupported statement that it was last enforced in 1858. In this connection, and in response to footnote 2 of the Memorandum, Respondent attaches, as Exhibit B, its brief filed in the United States Supreme Court.

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* The State also resisted a "mid-stream" remand during the appellate process, an awkward and unnecessary procedure in view of the Post-Conviction procedure available.

Conclusion

Respondent respectfully requests this Honorable Court to dismiss Petitioner's Petition for Writ of Habeas Corpus, or failing that, to affirm the judgment of the District Court denying bail.

Respectfully submitted,

Francis B. Burch,
Attorney General of Maryland,

Francis X. Pugh,
Assistant Attorney General
of Maryland,

Donald R. Stutman,
Assistant Attorney General
of Maryland,
Attorneys for Respondent.

(Certificate of Service.)

EXHIBIT "G"

United States Court of Appeals
For The Fourth Circuit

Misc. No. 917

Milan M. Vuitch, M.D.,
Petitioner,

versus

James Brown Hardy, Acting Warden of the Maryland State Penitentiary,
Respondent.

Order

(Filed March 9, 1972)

In petitioner's appeal from the order of the district court entered February 17, 1972, revoking bail theretofore granted, the court has considered petitioner's memorandum and exhibits thereto, the Warden's motion to dismiss appeal and memorandum and exhibits thereto, and the record on appeal; and, concluding that it has jurisdiction and that there are present exceptional circumstances, the court ORDERS:

1. That a certificate of probable cause to appeal is hereby granted.

2. That the order of the district court entered February 17, 1972, revoking the bail theretofore granted, is hereby reversed.

3. That the case is remanded to the district court with directions to continue the bail theretofore granted until the case is decided on the merits and, in the event that the district court concludes to deny the writ and petitioner seeks a further appeal, until the case is heard and determined on the merits by this court, or until further order of this court.

Harrison L. Winter,
United States Circuit Judge,

J. Braxton Craven, Sr.,
United States Circuit Judge,

John D. Butzner, Jr.,
United States Circuit Judge.

A True Copy, Teste:

Samuel W. Phillips, Clerk

By Frances S. Sewell,
Deputy Clerk.

In The
United States Court of Appeals
For the Fourth Circuit

Milan M. Vuitch, M.D.,
Petitioner,

v.

James Brown Hardy, Acting Warden of the Maryland State Penitentiary,
Respondent.

ORDER

Petitioner, Milan M. Vuitch, M.D., having filed an Appeal and/or Application for Bail, and the matter having been considered by the Court, it is this 23rd day of February, 1972, by the United States Court of Appeals for the Fourth Circuit,

ORDERED

1. The Order of the United States District Court for the District of Maryland dated February 12, 1972, granting Respondent's Motion for Denial of Application for Bail shall be and it is hereby stayed until the appeal herein can be determined;

2. Petitioner shall file any additional pleadings or memoranda on or before February 25, 1972;

3. Respondent shall file any responsive pleadings and/or memoranda within ten days thereafter.

/s/ HARRISON L. WINTER,
United States Circuit Judge.

United States Court of Appeals
For The Fourth Circuit

Misc. No. 917

Milan M. Vuitch, M.D.,
Petitioner,

versus

James Brown Hardy, Acting Warden of the Maryland State Penitentiary,
Respondent.

ORDER

The petition of the State of Maryland for rehearing, including a suggestion for rehearing in banc, having been read and considered, and no judge in active service having requested a poll on the suggestion for rehearing in banc, it is, with the concurrence of the panel, ORDERED, that said petition be, and it is hereby, denied.

For the Court:

/s/ HARRISON L. WINTER,
United States Circuit Judge.

A True Copy, Teste:

SAMUEL W. PHILLIPS, Clerk

By Diane Burke,
Deputy Clerk.

Rules of U. S. Court of Appeals 4th Circuit

Rule 7

Pre-Argument Review; Certificates of Probable Cause; Summary Dismissal of Appeals and Denials of Certificates of Probable Cause; Notice to Appellant or Applicant of Right To File Informal Statement and Use of Same.

(a) In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may, from time to time, designate a panel or panels to review any pending case at any time before argument for assignment or disposition under this rule. The chief judge may also refer to such a panel or panels any application for a certificate of probable cause to appeal a final order in a habeas corpus proceeding where the detention complained of arises out of process by a state court.

(b) If all of the judges of the panel to which a pending appeal has been referred conclude that the appeal is frivolous and entirely without merit, the appeal will be dismissed, or the judgment affirmed. If all of the judges of the panel to which a pending appeal has been referred conclude that the judgment below was clearly erroneous, or clearly defective, they may reverse, or vacate the judgment, or grant any other appropriate relief. If all of the judges of the panel to which an application for a certificate of probable cause has been referred conclude that the certificate should not issue, the certificate will be denied; but if any judge of such panel is of the opinion that the issue is debatable, or that full briefing and oral argument would be enlightening, or otherwise of assistance, the certificate will be issued, and the case set for a regular hearing. A pending appeal may be dismissed, or the judgment appealed from affirmed, reversed, or vacated, or other appropriate relief granted, before the filing of briefs or before oral argument. In the case of an appeal from the denial of a writ of habeas corpus, such summary action may be taken contemporaneously with, or at any time

after, action upon the application for a certificate of probable cause.

(c) Whenever an application for a certificate of probable cause shall be made, or an appeal taken from the denial of a writ of habeas corpus after issuance of a certificate of probable cause, or an appeal taken from the denial of a motion under 28 U.S.C. § 2255, the clerk shall notify the applicant or the party appealing, as the case may be, that he may file, within twenty days after receipt of such notice, an informal statement describing the grounds upon which he claims that he is entitled to relief and setting forth the merits of his appeal. Such notice shall also describe the practice of the court with regard to summary disposition of appeals. Any informal statement filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1686

JAMES BROWN HARDY, Acting Warden of the Maryland State Penitentiary, *Petitioner,*

v.

MILAN M. VUITCH, M.D., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari and suggests that the Petition has been rendered moot by the June 30, 1972 judgment of the United States District Court for the District of Maryland in this cause declaring unconstitutional the statute under which Respondent had been convicted in state court and granting Respondent's application for a writ of habeas corpus.

CITATION TO OPINION BELOW

In addition to the opinions and orders cited by Petitioner, a further opinion by the United States District Court for the District of Maryland, issued June 22, 1972, has important bearing upon the Petition and is set out in the Appendix, *infra*, at 1a.-13a.

QUESTIONS PRESENTED

1. Whether this Petition to review the Court of Appeals' order granting federal post-conviction bail to Respondent has been made moot by a subsequent order of the District Court granting the writ of habeas corpus and declaring unconstitutional the statute under which Respondent had been convicted and sentenced to imprisonment.

2. Whether, in any event, the Petition is totally lacking in merit, since a question of bail, when granted, is peculiarly one of discretion for the courts, state or federal, in the jurisdiction involved.

STATEMENT OF THE CASE

In addition to the facts set out by Petitioner, one event has occurred which moots this appeal. Although the District Court on February 17, 1972, denied bail, that same Court subsequently, on June 30, 1972, granted this Respondent full relief on the merits, declaring the convicting part of the Maryland Therapeutic Abortion Act unconstitutional, and issuing the writ of habeas corpus. *Vuitch* v. *Hardy,* Civ. No. 71-1129-Y (D.Md.1972); Appendix 1a. Petitioner noticed an appeal from the judgment of the District Court on July 3, 1972.

ARGUMENT

The Petition is moot in that the Court of Appeals' order granting bail prior to a determination by the District Court of the merits has no further force and effect since Respondent, the bail-applicant, fully prevailed on the merits and obtained the requested writ of habeas corpus vacating the conviction under which Respondent was sentenced, thereby eliminating the need for bail.

The relief sought by Petitioner in this Court could not possibly be granted, as "there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez,* 177 U.S. 378, 390 (1900). Petitioner asks this Court to overturn the order of the Court of Appeals admitting Respondent to bail pending a decision by the District Court for Maryland on a petition for habeas corpus. Shortly before this Petition was filed, however, the District Court granted the writ of habeas corpus, and declared unconstitutional a restrictive provision in the Maryland Therapeutic Abortion Act. *Vuitch* v. *Hardy,* Civ. No. 71-1129-Y (D. Md. 1972); Appendix 1a. Accordingly, any judgment by this Court would lack subject matter on which to operate. Respondent does not now need bail, because his jail sentence in state court has been vacated by a decision that the convicting statute was invalid.

Similarly, a judgment in favor of Petitioner would be useless, unless Petitioner should ultimately prevail on its appeal of the District Court decision on the merits to the Court of Appeals, and then fail to persuade the Court of Appeals that bail pending a petition by Respondent to this Court should be withheld. "But such speculative contingencies afford no basis for . . . passing on the substantive issues . . . ." *Hall* v. *Beals,* 396 U.S. 45, 49 (1969). To have effect, a judgment by this Court would be contingent on the occurrence or non-occurrence of not just one, but several factors. Such a judgment, even if it could be formulated, would constitute precisely the type of advisory opinion forbidden by Article III.

In any event, the Petition is wholly lacking in merit and should be denied even if the case were not moot. A decision *granting* bail, unlike one which denies bail

and thus deprives someone of his liberty, is a discretionary one peculiarly for local courts, whether state or federal. The exercise of the court's discretion will vary from case to case. Here, for example, Respondent had long-standing family, professional and community ties; he had received bail all the way through the state courts and had violated no conditions thereof; there was no suggestion in the record or by the State that he was anything but an excellent bail risk; and the substantiality of his constitutional claims was demonstrated by the District Court judgment in his favor on the merits. The exercise of discretion to grant bail in such a case is hardly a matter of national importance requiring this Court's attention.

CONCLUSION

For the reasons set forth herein, we respectfully submit that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

ROY LUCAS
230 Twin Peaks Blvd.
San Francisco, Calif. 94114

E. BARRETT PRETTYMAN, JR.

TIMOTHY J. BLOOMFIELD
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for Respondent.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL No. 71-1129Y

MILAN M. VUITCH, M.D.,
Petitioner

v.

JAMES BROWN HARDY,
Acting Warden of the Maryland State Penitentiary,
Respondent

Judgment

In accordance with the Memorandum Opinion and Order dated June 22, 1972, filed in the above case, it is

ORDERED AND ADJUDGED:

(1) That Petitioner's application for the issuance of a Writ of Habeas Corpus is hereby granted.

Dated at Baltimore, Maryland this 30 day of June 1972.

PAUL R. SCHLITZ,
Clerk of Court

By (Illegible)
Deputy Clerk

Filed June 30, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL No. 71-1129-Y

MILAN M. VUITCH, M.D.,
Petitioner

v.

JAMES BROWN HARDY,
Acting Warden of the Maryland State Penitentiary,
Respondent

Memorandum Opinion and Order

Milan M. Vuitch, M.D., brings this petition for habeas corpus following his conviction in the Circuit Court for Montgomery County, Maryland, for violation of Article 43, § 139 of the Maryland Code Annotated. That section provides, in part, that a person is guilty of a misdemeanor if he performs a therapeutic abortion in any facility other than "a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene. . . ." Following a trial before the Honorable Ralph G. Shure, petitioner was sentenced, on November 18, 1969, to serve a term of three years in prison, two of which were suspended, and to pay a fine of $5,000. Petitioner sought unsuccessfully to raise the issue of the constitutionality of the statute in the state courts, and this Court, having previously determined that petitioner has sufficiently exhausted his state court remedies,[1] now turns to a consideration of that issue.

I.

At the outset, in the interest of more clearly delineating the constitutional question presented, certain issues

[1] Order filed February 17, 1972.

which are not relevant to the present inquiry should be emphasized.

First, the reasons for which a woman is statutorily permitted to seek an abortion[2] are not relevant here, and this Court expresses no opinion as to the constitutionality of

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[2] No criminal penalties are provided for violation of Article 43, § 137, of the Maryland Code ("conditions under which termination of pregnancy permitted; records and reports."). The Maryland statute thus appears to be distinguishable from those involved in the cases cited at note 3, *infra*.
Section 137 provides:

> (a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exist:
>
> (1) Continuation of the pregnancy is likely to result in the death of the mother;
>
> (2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;
>
> (3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;
>
> (4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.
>
> (b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termina-

the statutory limitations on those reasons.[3] Neither is the statutory protection in § 138 of hospitals and medical personnel from civil liability for refusal to perform an abortion at issue here.

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tion of a human pregnancy otherwise than by birth unless all of the following conditions exist:

(1) Not more than twenty-six weeks of gestation have passed (except in the case of a termination pursuant to subsection (a)(1) or where the fetus is dead);

(2) Authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital.

(c) The hospital abortion review authority shall keep written records of all requests for authorization and its action thereon. An annual report of the therapeutic abortions performed in Maryland shall be made by the director of the hospital and its governing board. Such reports shall include the number of requests, authorizations and performances, the grounds upon which such authorizations were granted, and the procedures employed to cause the abortions and such reports shall be forwarded to the joint commission on accreditation of hospitals and the State Board of Health and Mental Hygiene for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals. Such information, which is not subject to the physician-patient privilege, may be made available to the public. Said reports shall not include the names of the patients aborted.

[3] Compare, e.g., *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970), *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Texas 1970); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970); *Doe v. Scott*, 321 F. Supp. 1385. (N.D. Ill. 1971); *United States v. Vuitch*, 402 U.S. 62 (1971); *Y.W.C.A. v. Kugler*, ... F. Supp. ..... (D.N.J. Feb. 1972); *Abele v. Markle*, ... F. Supp. ..... (D. Conn. Apr. 1972), which held statutory limitations on the reasons for which a woman might obtain an abortion invalid. Cf. *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970); *State v. Abodeely*, 179 N.W. 2d 347 (Iowa, 1970); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio, 1970); *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D. N.C. 1971), which upheld such statutory limitations.

Second, the propriety or wisdom of petitioner's conduct in this particular case should not be relevant to a determination of the validity of the statute under which he was indicted and convicted. The Court has found nothing in the record that clearly precludes the possibility that at the time of the arrest Dr. Vuitch was in fact operating an "abortion mill," and if that were the case, his practices would surely deserve our strongest censure. However, that possibility is not controlling here, nor is the fact that Dr. Vuitch did not attempt in this case to perform the abortion in a licensed, accredited hospital, for if the statute under which he was indicted and convicted is unconstitutional on its face then the petition for habeas corpus must be granted. See *Eisenstadt v. Baird*, ... U.S. ....., 31 L. Ed. 2d 349, 92 S.Ct. 1029 (March 22, 1972).[4]

II.

Petitioner argues that a woman has a constitutionally protected "fundamental personal right" to seek an abortion, that any restriction by the State of that right must, therefore, be supported by a "compelling state interest" and must also be shown to be necessary in that there are no other reasonable alternatives open to the State which would promote that interest and which would entail less of a burden on the woman's exercise of her rights. Petitioner argues that a less restrictive and still reasonable alternative to the hospitalization requirement embodied in Article 43, § 139, is in fact available to the State—i.e. restricting the performance of abortions to specially licensed facilities in addition to hospitals. Petitioner has supported his argument with numerous affidavits and exhibits which tend to show that there is wide-spread agreement among the medical profession that hospitalization is not generally neces-

[4] The *Eisenstadt* decision, and its predecessor *Griswold v. Connecticut*, 381 U.S. 479 (1965), also establish that petitioner has standing here to assert the constitutional rights of his patients and potential patients.

sary for performances of abortions in the first trimester of pregnancy;[5] that state-regulated clinics which perform abortions have been found to be safe and easily regulated in other states;[6] and that many Maryland women have been induced to seek abortions in other states because of the costs and scheduling delays attendant upon the requirement that abortions in Maryland be performed in licensed, accredited hospitals.[7]

The State implicitly denies that a woman has a "fundamental personal right" to seek an abortion by basing its arguments on the existence of a "reasonable basis" for the legislative determination that abortions should only be performed in licensed, accredited hospitals. In support of this argument the State also has submitted affidavits and exhibits, which tend to show that a number of leading specialists in obstetrics and gynecology feel that abortions should be performed in hospitals because of the possibility of complications;[8] that abortions in Maryland have been at least as accessible to non-private patients as to private patients;[9] and that only two hospitals in the State which provide obstetrical and gynecological services are not accredited by the Joint Commission on Accreditation of Hospitals.[10]

If a woman does not have a "fundamental personal right" to seek an abortion, then the requirement that the abortions be performed in a hospital might be upheld; the State's interest in protecting the woman from the possi-

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[5] See, e.g. Petitioner's affidavits 1-4, 8, 10-15.

[6] Petitioner's affidavits 2, 8, 10-15.

[7] Petitioner's affidavits 5, 6.

[8] Respondent's affidavits 1, 3, 4, 6, 7, 8, 17.

[9] Respondent's affidavit 4.

[10] Respondent's affidavit 5.

bility, however remote, of complications following abortion probably satisfies the minimal requirements of a "reasonable basis" for the legislation.[11] *Dandridge v. Williams*, 397 U.S. 471 (1970). However, this Court is convinced that a woman does have a constitutionally protected, "fundamental personal right" to seek an abortion. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird, supra*, 31 L.Ed. 2d 349, 362, 92 S.Ct. 1029, 1038. (Emphasis deleted.) Our inquiry, therefore, turns to the questions of whether Maryland has a "compelling state interest" which is being promoted by the hospitalization requirement and whether no "other, reasonable ways to achieve those goals with a lesser burden on

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[11] The Court would have considerably more difficulty in finding a "reasonable basis" for that portion of the statutory requirement that demands that abortions be performed in a hospital that has been accredited by the Joint Commission on Accreditation of Hospitals. In the first place, the affidavit (No. 9) of the member of the Joint Commission, submitted by petitioner, establishes that accreditation by the Commission is granted or withheld entirely without regard to the particular hospital's policy on abortions, and this is not contradicted by the State. In the second place, if the high level of safety and competence which may be inferred from the fact of accreditation forms the "reasonable basis" for the legislation, it is hard to understand how the State can justify sanctioning the existence of *any* unaccredited hospital in the State, in view of the undisputed fact that almost all other surgical procedures present a greater mortality and morbidity risk to the patient. If a woman were held not to have a fundamental personal right to seek an abortion, this lack of a "reasonable basis" for the accreditation requirement would constitute an alternative ground for granting the petition since the accreditation requirement is an integral part of the statute under which Dr. Vuitch was convicted. However, in view of the Court's belief that the existence of a "reasonable basis" for the statutory requirement will not suffice to support its validity, it is not necessary to decide this point.

constitutionally protected activity," *Dunn v. Blumstein*, ... U.S. ....., 31 L.Ed. 2d 274, 285, 92 S.Ct. 996, 1003 (March 21, 1972), are open to the State.

III.

Ordinarily the first possible "compelling state interest" which comes to mind in connection with abortion legislation is the protection of the rights of the fetus. However, in this case it is unnecessary to decide whether this interest is sufficiently compelling to justify the statutory limitation on constitutionally protected activity, for it is clear that that interest is not being promoted by the statutory provision under consideration; the fetus cannot be said to have an interest in being aborted in a hospital rather than elsewhere.

On the other hand, protection of the health of its citizens has always been considered to be a strong state interest, e.g., *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908), *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), and there is clearly a rational connection between that interest and the hospitalization requirement which is being attacked here. Abortion is a surgical procedure and obviously affects the patient's health. However, the Court believes that reasonable alternatives have been shown to exist which would entail less of a burden on the exercise of constitutional rights.

As Justice Marshall said in the recent case of *Dunn v. Blumstein, supra:*

> Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' . . .

Petitioner has shown, and this Court finds as a fact, that the requirement that abortions be performed only in licensed, accredited hospitals does place some burden on Maryland women's rights to seek an abortion, that that burden would be lightened by permitting abortions to be performed in other facilities as well, and that the experience of other states has proved that, with appropriate regulation, facilities other than hospitals can and do protect the health of the women seeking an abortion as adequately as hospitals do. The Court believes that regulation of these alternative facilities is perfectly feasible; the affidavit of Dr. Seegar, the Chief of the Maternity and Family Planning Section, Division of Maternal and Child Health, Maryland State Department of Health and Mental Hygiene, is particularly persuasive.[12] Indeed, it has also been pointed out that specialized abortion facilities might be more susceptible to regulation than hospitals in their abortion practices, for not only would such facilities' abortion practices be more visible, but the State might also be less hesitant to revoke such a facility's license than to revoke a hospital's license. A wide variety of alternatives are open to the State in protecting the health of the woman seeking abortion. Simply by way of illustration: it may require licensure by clinics and conformity by those

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[12] Petitioner's affidavit No. 7, p. 3, para. 6-7:

> It is my opinion that the State Department of Health and Mental Hygiene is fully capable of establishing and administering regulations less restrictive than mandatory hospitalization for licensed non-hospital facilities, located near hospitals, which could provide safe and less expensive first trimester pregnancy termination.
>
> . . . Administratively, there appears to me to be no reason why an adequate non-hospital licensed facility cannot be regulated as well as a hospital insofar as a therapeutic abortion program is concerned. In both cases the same types of forms for statistical purposes can be utilized, filled out by attending physician and assistants, and designed to ensure compliance with the law.

clinics to administrative regulations as a condition of licensure; it may permit the medical profession to make a free decision as to hospital, clinic or office for performance of abortions in each particular case, as it now does with regard to other types of patients and procedures; it may require that only specialists in obstetrics and gynecology perform abortions, or it may allow any licensed practitioner to perform them, or even specially-trained para-medical personnel under appropriate supervision; it may require that abortions only be performed in facilities which have a "back-up" arrangement with a nearby hospital in case of complications, as is apparently a requirement in other states;[13] it may require that the doctor or doctors who use the facility have staff privileges at the back-up hospital so as to preserve continuity of patient care.[14] These alternatives, which have in many cases been shown by experience to be feasible, would surely involve less of a burden on the exercise of a woman's right to seek an abortion, for it is impossible to doubt that it is far easier to establish a clinic or other facility limited to one specialized procedure than to establish an entire hospital, and the greater the number of adequate facilities available the smaller the burden on the exercise of the right. And it may be possible for the state to put many of the controls into effect by regulation of the Department of Health and Mutual Hygiene, without the necessity of further legislative action.

There is one other possible "compelling state interest" which should be discussed, although the State has not suggested it: Maryland may have a legitimate interest in regulating the conduct of medical practitioners who per-

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[13] E.G. New York, Washington; the Court is particularly impressed with the Washington State Board of Health's regulations, found at pp. 17-22 of Petitioner's Exhibit D.

[14] This enumeration of alternatives is in no way intended to be exhaustive, and this Court expresses no opinion as to the wisdom or constitutionality of any particular alternative.

form abortions. It is common knowledge that, at least prior to the 1968 revision of Maryland's abortion laws, abortions were, occasionally or frequently, performed illegally, by persons of questionable competence and under questionable hygenic conditions. It may be that some Maryland women, perhaps under the impression that anonymity will be better preserved, seek out certain of these practitioners who may charge very high fees for their alleged services; at least Maryland would be justified in taking some measures in response to that possibility. If control of medical practitioners who perform abortions were the "compelling state interest" which the statute was designed to promote, then the accreditation requirement also could be justified as promoting that interest, since the exhibits submitted in this case show that the quality and frequency of peer review is one of the criteria by which the Joint Commission makes its decisions on accreditation.

But here again the requirement that there be no other reasonable method of promoting the State's interest which involves less of a burden on constitutionally protected activity cannot be met. Maryland already has a strong statute, Article 43, § 130, Annotated Code of Maryland, regulating the professional conduct of physicians; it empowers the Commission on Medical Discipline, part of the State's Department of Health and Mental Hygiene, to take action against a physician for any one of nineteen reasons, including willful misrepresentation in treatments, gross, willful and continued overcharging for professional services, willful omission to file reports required by law, and professional incompetency. In regulations governing licensed facilities, or even by statutory provision, the State may set maximum fees for termination of pregnancy or take such other steps as it deems necessary to protect against the legacy of illegal abortions. And if the state wishes to guard against the performing of abortions by non-medical practitioners, it may prosecute such people

for practicing medicine without a license. See, e.g., *Rock v. State*, 6 Md. App. 616 (1969).[15]

IV.

Various arguments presented by the State remain to be considered.

It is argued that, although the medical profession may now be in substantial agreement on the safety of clinical abortions in the first trimester of pregnancy, no such agreement existed in 1968 when Dr. Vuitch performed the abortion which was the basis for his prosecution, and that, therefore, the use of 1972 statistics constitutes some sort of "bootstrap" argument. The State's argument mistakes the nature of the Great Writ, for it is not alleged that clinical abortions actually *were* unsafe in 1968—only that the medical profession had not at that time recognized their safety. It would be manifestly unfair to require Dr. Vuitch to serve a prison term solely because he may have recognized a fact which many of his colleagues had not.

The State contends that the decision on the proper location for performance of abortions is a matter of judgment, that its medical affidavits show that the decision to restrict the proper location to licensed, accredited hospitals is not an unreasonable judgment, and that the most appropriate institution to make that judgment is the legislature and not the court. The short answer to this argument is that Federal constitutional rights are involved, and that Federal Courts have an affirmative duty to make independent judgments in such cases. By making an independent judgment in this case as to the Federal constitutional rights, the Court intends to leave the medical profession and the legislature free to exercise their judgment in their respective fields of expertise.

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[15] One court, at least, has also suggested that the State may prosecute those who perform abortions under the common law, which made it a crime to perform an abortion on a woman who was more than three months pregnant. *Y.W.C.A. v. Kugler*, *supra*.

It is also argued by the State that this Court should abstain from a decision in this case because another prosecution against Dr. Vuitch is currently pending in the state courts in which Dr. Vuitch has raised, this time in proper form, the same constitutional issues as are presented here. However, the doctrine of abstention is inappropriate in this case. Federal courts will abstain from deciding a dispute when it could be resolved by determination of a previously undetermined point of state law; they will not abstain when the undetermined issue is solely one of Federal constitutional rights. The state statute in this case, although largely uninterpreted by the state courts, is quite unambiguous, and the only issue raised is its constitutionality. In such cases the Federal courts have a positive duty not to abstain. *Baggett v. Bullitt,* 377 U.S. 360 (1964).

Finally, the State argues that there is no showing that any Maryland woman has been absolutely unable to obtain an abortion in Maryland. But no such showing is necessary. As the Supreme Court noted recently in *Dunn v. Blumstein, supra,* it is not necessary to show that the legislation actually and totally deterred the exercise of a constitutional right; it is enough that the legislation is shown to have placed an unnecessary burden on the exercise of the right, and that showing has been made here. The validity of Article 43, § 139, cannot be upheld in the face of such a showing.

Therefore, it is this 22nd day of June, 1972, by the United States District Court for the District of Maryland, ORDERED:

1. That the petition for a writ of habeas corpus be and it is hereby granted; and

2. That the Clerk mail a copy of this Memorandum Opinion and Order to petitioner, to Roy Lucas, attorney for petitioner, and to Francis X. Pugh, Assistant Attorney General of the State of Maryland.

JOSEPH H. YOUNG
United States District Judge